85-2005 (1)

Supreme Court, U.S.
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No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1985

LOUISE E. LEWIS and VELMA "SLIM" IVORY,
Plaintiffs and Appellants,

vs.

CHARLES L. McMASTERS, JIM MEDER, and PAUL KALPAKOFF,
Defendants and Appellees.

ON APPEAL FROM THE NINTH CIRCUIT COURT OF APPEALS

JURISDICTIONAL STATEMENT

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1. Questions Presented On Appeal.

A. IN A CIVIL ACTION FOR VIOLATION OF CIVIL RIGHTS, WAS IT ERROR FOR THE NINTH CIRCUIT COURT OF APPEALS AND FOR THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA TO HOLD THAT LAW ENFORCEMENT OFFICERS CONDUCTING A WARRANTLESS SEARCH AND SEIZURE UNDER THE GUISE OF CALIFORNIA **VEHICLE CODE** SECTION 2805, A REGULATED BUSINESS INSPECTION STATUTE, WERE NOT REQUIRED TO OBEY THAT STATUTE NOR TO HONOR THE CIVIL RIGHTS PROTECTIONS ACCORDED THEREIN BECAUSE NO COURT OF RECORD IN A PUBLISHED OPINION EVER BEFORE TOLD THEM THEY MUST, ESPECIALLY WHEN NEITHER THE LAW ENFORCEMENT OFFICERS NOR THE COURTS BELOW EVER ASSERTED NOR CLAIMED THAT THE STATUTE IN QUESTION WAS UNCLEAR, UNCERTAIN, VAGUE, AMBIGUOUS, OVERBROAD OR LACKING IN ANY LEGITIMATE STATE PURPOSE, NOR THAT THEY

DID NOT NOR COULD NOT UNDERSTAND THE PRECISE LANGUAGE OF THE STATUTE, IN A CASE IN WHICH INNOCENT DEFENDANTS WERE CONVICTED OF A CRIME ON THE BASIS OF ILLEGALLY SEIZED EVIDENCE, LATER PROVED TO HAVE BEEN INTENTIONALLY AND PURPOSEFULLY MANUFACTURED, FABRICATED AND PLANTED BY PERSON OR PERSONS UNKNOWN FOR THE PURPOSE OF CONVICTING PLAINTIFFS, WHO WERE THEN DEFENDANTS IN A CRIMINAL TRIAL.

B. IN A CIVIL ACTION ARISING OUT OF VIOLATION OF CIVIL RIGHTS THROUGH WARRANTLESS SEARCH AND SEIZURE BY LAW ENFORCEMENT OFFICERS, UNDER THE GUISE OF CALIFORNIA **VEHICLE CODE** SECTION 2805, A PERVASIVELY REGULATED BUSINESS INSPECTION STATUTE, WAS IT ERROR BY THE NINTH CIRCUIT COURT OF APPEALS AND THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA TO HOLD THAT WHEN LAW ENFORCEMENT OFFICERS COULD NOT BE HELD TO OBEY

STATUTORY LAW PROTECTING THE CIVIL RIGHTS OF CITIZENS, THE SEARCH WARRANT PROVISIONS OF THE **FOURTH AMENDMENT** ALSO DID NOT APPLY, SO AS TO GRANT LAW ENFORCEMENT OFFICERS, ACTING UNDER A REGULATORY BUSINESS INSPECTION STATUTE SUCH AS CALIFORNIA **VEHICLE CODE** SECTION 2805, FOR THE FIRST TIME, COMPLETE AND TOTAL IMMUNITY FROM THEIR DUTY AND OBLIGATION TO OBEY EITHER THAT STATUTE OR THE **FOURTH AMENDMENT**.

C. WAS IT ERROR FOR THE COURTS BELOW TO HOLD THAT, WHERE THERE IS NO CHALLENGE TO THE CLARITY OR UNDERSTANDABILITY OF THE LANGUAGE OF A BUSINESS INSPECTION STATUTE, LAW ENFORCEMENT OFFICERS ARE NOT REQUIRED TO OBEY THE STATUTORY LAW UNTIL A COURT OF RECORD IN A PUBLISHED OPINION TELLS THEM THEY MUST.

D. IS IT A USURUPATION OF LEGISLATIVE POWER FOR THE JUDICIARY TO TELL PUBLIC OFFICIALS THAT THEY DO NOT HAVE TO

OBEY STATUTORY ENACTMENTS OF LEGISLATIVE BODIES PROTECTING THE CIVIL RIGHTS OF INDIVIDUAL CITIZENS UNTIL A COURT OF RECORD IN A PUBLISHED OPINION TELLS THEM THEY MUST.

E. WAS IT ERROR FOR THE COURTS BELOW, IN A CIVIL ACTION FOR VIOLATION OF CIVIL RIGHTS, TO HOLD THAT LAW ENFORCEMENT OFFICERS COULD NOT BE HELD TO BE RESPONSIBLE FOR OBEYING CLEAR, UNAMBIGUOUS STATUTORY LAW BECAUSE TWO UNITED STATES DISTRICT JUDGES, AFTER THE FACT AND IN SUCCESSION, HELD THERE WAS NO VIOLATION, NOTWITHSTANDING THE FACT THAT NEITHER THE DEFENDANT LAW ENFORCEMENT OFFICERS NOR THE UNITED STATES DISTRICT JUDGES NOR THE JUDGES OF THE NINTH CIRCUIT COURT OF APPEALS EVER ASSERTED THAT THE LANGUAGE OF CALIFORNIA **VEHICLE CODE** SECTION 2805 WAS UNCLEAR, UNCERTAIN, VAGUE, AMBIGUOUS, UNINTELLIGIBLE, NONUNDERSTANDABLE, OR

INCOMPREHENSIBLE, AND ESPECIALLY WHERE DEFENDANT LAW ENFORCEMENT OFFICERS CLAIMED TO HAVE BEEN OPERATING UNDER SAID STATUTE FOR SEVERAL YEARS.

2. **Parties to the Action.** The following individuals, as represented by respective counsel, are parties to this action:

a. Plaintiffs LOUISE E. LEWIS and VELMA "SLIM" IVORY, represented by Leonard C. Hoar, Jr., Attorney at Law, 3948 E. Gettysberg, Fresno, California 93726.

b. Defendant California Highway Patrol Auto Theft Investigator CHARLES L. McMASTERS and defendant California Highway Patrol Officer JIM MEDER, represented by JOHN K. VAN DE KAMP, Attorney General of the State of California, SEWARD L. ANDREWS, Deputy Attorney General, G. MICHAEL GATES, Deputy Attorney General, 1515 K Street, Suite 511, Sacramento,

California 95814.

C. Defendant Fresno County Deputy Sheriff PAUL KALPAKOFF, represented by JAMES D. WEAKLEY, of ELDRIDGE, ANDERSON & WEAKLEY, Attorneys at Law, 5250 N. Palm, Suite 202, Fresno, California 93704.

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19 **ALR 3d** 727

5. **Reports of Opinions Below.**

a. **Lewis v. McMasters**, 663 F.2d 954 (9th Cir. 1982) [hereinafter **Lewis v. McMasters I**]

b. **Lewis v. McMasters**, unpublished opinion, Ninth Circuit, No. 84-2200, filed October 22, 1985. [hereinafter **Lewis v. McMasters II**]

c. **Lewis v. McMasters**, unpublished order, Ninth Circuit, No 84-2200, filed December 23, 1985.

d. **Lewis v. McMasters**, unpublished opinion, United States District Court, Eastern District of California, May 30, 1984.

6. **Jurisdiction**.

a. This is a civil rights action based upon 42 **U.S.C.** 1983.

b. Judgment was entered October 22, 1985.

c. Order denying rehearing and rejecting rehearing en banc was entered December 23, 1985.

d. Notice of appeal was filed January 22, 1985.

e. Basis of jurisdiction of appeal to this Court is 28 **U.S.C.** 1254(b). In the present case, the Ninth Circuit held in a civil rights action under the

Fourth Amendment and 42 U.S.C. 1983 that California Vehicle Code Section 2805, upon which plaintiffs relied, was not enforceable against defendant law enforcement officers to restrict the warrantless business inspections until a court of record in a published opinion told them they must.

7. Constitutional and Statutory Authority.

a. United States Constitution, Fourth Amendment.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

b. 42 U.S.C. 1983.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

> Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this action, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

c. California **Vehicle Code** Section 2805, as it existed on July 27, 1976.

> "A member of the California Highway Patrol may inspect any vehicle of a type required to be registered under this code on a highway or in any public garage, repair shop, parking lot, used car lot, automobile dismantler's lot, or other similar establishment, for the purpose of locating stolen vehicles, investigating the title and registration of vehicles, or inspection of vehicles wrecked or dismantled."

8. **Concise Statement of Case**. (All citations herein to ER refers to the Excerpts from the Record before the trial

court on defendants' motions for summary judgment, and these references are from the Statement of Facts presented in the Opening Brief before the Ninth Circuit Court of Appeals.)

A. Statement of the Facts.

On July 27, 1976, plaintiff LOUISE E. LEWIS was the owner and operator of the business known as AAA Auto Sales and Dismantling. Plaintiff VELMA "SLIM" IVORY was employed as her yard manager. (ER 109)

Defendants CHARLES L. McMASTERS and JIM MEDER were law enforcement officers of the California Highway Patrol, (ER 90: 22, 93: 22) and defendant PAUL KALPAKOFF was a Deputy Sheriff of the County of Fresno, State of California. (ER 84: 21-22)

On July 23, 1976, at approximately 1700 hours, Karen Cence, an employee of the Fresno County Sheriff, received an

anonymous telephone call from a man stating that there were five stolen vehicles being cut up at the AAA Auto Dismantling at 2791 S. Elm, Fresno, California. (ER 35: 5-10; 110)

Deputy Sheriff Francisco Martinez of the Fresno County Sheriff's Department called LOUISE E. LEWIS the same day, advised her of the anonymous telephone call, asked if he could come to inspect, she said "yes", and he went out and inspected the same afternoon. (ER 134-135)

On July 26, 1976, Karen Cenci informed defendant KALPAKOFF of the anonymous phone call. He then contacted defendant McMASTERS of the California Highway Patrol Auto Theft Unit the same day and requested assistance in checking vehicles on the premises of AAA Auto Dismantlers under authority of Section 2805 of the **Vehicle Code** Section 2805 (not Section 320). (ER

110; 113; 119: 13-18) Defendants McMASTERS and MEDER claim that they made an inspection under the provisions of **Vehicle Code** Section 320, but have been unable to cite any page of the criminal trial proceedings in which such claim was made, nor any document created by them at the time in which the claim was made, nor any document created by them at the anytime in which the claim was made. Defendant KALPAKOFF, who initiated the investigations, clearly cites only **Vehicle Code** Section 2508 as the basis for his requesting assistance of McMASTERS and MEDER. (ER 35: 14-15; 37: 20-24) McMASTERS supplemental Narrative report likewise reflects that KALPAKOFF requested assistance only under **Vehicle Code,** Section 2805 (ER 110) At the preliminary hearing in the criminal case, McMASTERS testified only that he inspected

under **Vehicle Code** Section 2805. (ER 119: 13-18)

On July 27, 1976, defendants, as law enforcement officers, conducted a warrantless search and seizure of plaintiffs' premises at AAA Auto Sales and Dismantling pursuant to the anonymous telephone tip. The search and seizure was conducted under the +guise of an inspection pursuant to the provisions of California **Vehicle Code** Section 2805. (ER 119: 23-18)

When the defendants arrived, they stated that they were there on a business inspection and wanted to through the yard. They then conducted their inspections. (ER 113: 5-15)

While in an area inside the workshop, (item 20. ER 46), defendant MEDER spotted a 55 gallon barrel used for heating the area and burning trash. He observed a license plate among other items, (not

identified) inside the barrel. He says he retrieved several other license plates from the barrel, made a check with DMV, and found that a number of them were on a stolen car list. (ER 95: 15-25) Defendant McMASTERS also makes the same claim, and then stated that the license plates and barrel were seized as evidence. (ER 92: 1-4) However, defendant KALPAKOFF, who made the inventory of all property seized (ER 39-49) states that he was advised by McMASTERS that he found a trash barrel, that he started looking into it and found a partially cut license plate and a Z28 emblem sitting at or near the top. (ER 36: 20-27) KALPAKOFF stated that it was decided to take the barrel because the ground was dusty and oily, it would be difficult to search the barrel and keep the contents separate from that which was on the ground, and they were

afraid they would lose contents. (ER 16: 2-11) KALPAKOFF'S inventory, (item 20e ER 47,) reflects "Calif. license plates with numbers cut out. Removed from 20" (the 55 gallon trash barrel).

McMASTERS confiscated the trash barrel. (ER 127: 10-12) It was a 50-gallon drum. (ER 121: 24-25) McMASTERS and the other defendants loaded it on a truck and transported it to the County Industrial Farm where they went through the contents the next day. (ER 37: 2-19; 122: 8-15) Defendants poured out the contents of the 50-gallon drum on an equipment washpad, searched the contents, and found the documents which became People's Exhibit 4 at trial (ER 122:16-124:9) which included a vehicle registration card, a parking permit, a pink slip, and a VIN plate which belonged to cars that had been stolen. (ER 46, 20-47:item 20D). The

documents had been partially burned. (ER 138: 1-2).

Strangely enough, although these documents were found on July 28, 1976, they were not mentioned in the CHP narrative report prepared by defendant McMASTERS on July 29, 1976. (ER 110) The contents of the 50-gallon drum were not mentioned until the Supplemental Report dated August 3, 1976. (ER 112)

Significantly, defendants McMASTERS and MEDER have not produced any report showing that they reported the license plates to stolen vehicles in their narrative reports. They certainly are not listed in KALPAKOFF'S inventory of things found in the 50-gallon drum. (ER 46-47) In fact, what KALPAKOFF reported in item 20e, ER 47, is license plates with the numbers cut out, hardly something that could be run through DMV, and hardly prob-

able cause to seize the 50-gallon drum, transport it, and later search it.

At the preliminary hearing, McMASTERS, when asked to identify the photograph in Exhibit 13, stated that it was the trash-barrel in the northeast corner of the building same as item 20, at ER 36, in building identified as item 21, ER 39, in KALPAKOFF;s declaration), and that the photographs show a set of license plates that had been burned with a torch. (ER 115: 15-24) Later, he testified that the only requirement about license plates is that they be destroyed or turned into DMV. (ER 120: 23-24) At trial, McMASTERS further testified that there were license plates all over the yard, it was not unusual except that plaintiff IVORY burned the plates, and that IVORY made a special effort, whereas most yards only cut them in half. (ER 130: 12-25) Finally,

McMASTERS testified that IVORY had shown him and MEDER a box of license plates, the pairs taped together with masking tape, labeled with the acquisition number and license number of the vehicles from which they were removed, and that he removed and labeled all such license plates from the vehicles. (ER 114: 15-24) McMASTERS did not testify that this was for the purpose of sending them to DMV.

The District Court, in its Order of May 30, 1984, found that it was uncontroverted that Officer Meder observed a license plate in plain view in the trash barrel, that upon closer observation he discovered other license plates in the trash barrel, and that when he ran a check with the Department of Motor Vehicles some of the license plates were reported stolen. (ER 245: 11-18) McMASTERS' testimony from a photograph at the prelimi-

nary hearing certainly contradicts both the declarations of McMASTERS (ER 92: 1-4) and MEDER (ER 95: 15-25). McMASTERS' testimony at the criminal trial that IVORY made a special effort to destroy the plates (ER 130: 10-25) certainly contradicts MEDER'S statement as to how the plates were handled. And KALPAKOFF's inventory (ER 47, item 20e) confirms McMASTERS' testimony at preliminary hearing that the plates were burned -- had the numbers cut out. (ER 115: 15-24)

Plaintiffs raised the issue that these claims by McMASTERS and MEDER (ER 92: 1-4 and 95: 15-25) of finding license plates to stolen vehicles was of recent origin. (See plaintiffs' motion papers, ER 168:13-28) McMASTERS' memory, aided by testifying from a photograph (ER 115: 22-26) on September 17, 1976 (ER 105, item 6, for date) was certainly far fresher -- just

two months after the inspection of July 27, 1976, than it was on November 4, 1983, (ER 92: 7), over 7 years later.

Of equal importance, McMASTERS testified at the preliminary hearing that the burned license plates and Z28 emblem were on top of the contents of the barrel (ER 115: 18 - 116: 4), and that he went through the balance of the contents at the County Industrial Farm the next day. (ER 116: 8-17) Thus, there was no "search" of the barrel on July 26, 1976.

It is difficult to understand how MEDER could have walked through the dismantling yard without noticing the burned license plates that McMASTERS saw and recognizing that burning was the standard method of destruction and disposal.

The partially burned documents found in the 50-gallon drum were used by defendants as a basis for the arrest of defen-

dants under the provisions of California **Penal Code** Section 496 on the charge of possession of stolen automobiles as second hand dealers and auto dismantlers. (ER 110-112) Ultimately, they were used to convict plaintiffs LEWIS AND IVORY. (ER 131-132)

Plaintiffs were innocent of the felony crimes with which they were charged, arrested, tried, convicted and sentenced -- the partially burned documents were false evidence. (ER 136-141)

While an appeal was pending in People v. Lewis and Ivory in action 56 Crim. 3158, before the Court of Appeal of the State of California, Fifth Appellate District, plaintiffs contemporaneously filed a petition for writ of habeas corpus before the Honorable Frank J. Creede, Jr., Judge of the Superior Court, on the ground that the evidence in People's Exhibit No.

4 at trial -- the partially burned documents -- had been intentionally and purposefully manufactured, fabricated, and planted by person or persons unknown for the purpose of incriminating plaintiffs -- and Judge Creede so found in issuing the writ. (ER 103: 22-104: 26; 136-141)

On December 8, 1978, upon stipulation of plaintiffs and the Attorney General of the State of California, in People v. Louise E. Lewis and Velma "Slim" Ivory, 5 Crim. 3158, The Honorable George A. Brown, Presiding Justice of the Court of Appeal of the State of California, Fifth Appellate District, entered his order reversing the judgments of conviction against plaintiffs, based upon the stipulation of the parties. (By inadvertence, this document was not included in plaintiffs' motion papers, and plaintiffs requested the Ninth Circuit to take judicial notice of

its own files in Lewis v. McMasters, CA 80-4059, (ER 66)

b. Argument.

It has long been well-established law that a warrantless search and seizure remote in time and place from the arrest is unlawful and unconstitutional. **Preston v. United States** (1964) 376 U.S. 364, 84 S. Ct. 881, 11 L.Ed.2d 777. (See the abundant listing of additional cases in Witkin, **California Evidence 2nd**, "Exclusion of Illegally Obtained Evidence," Sections 119 and 120; 19 **ALR 3d** 727.)

In the instant case, defendants, without a search warrant, transported the 50-gallon drum from the AAA Auto Sales and Dismantling yard to the Fresno County Industrial Farm, and one day later dumped the contents, searched them, and found the partially burned documents. This conduct alone violated well-established law.

California **Vehicle Code** Section 2805 (originally enacted in 1959, and amended in 1970 to include auto dismantlers' lots and vehicles wrecked or dismantled) limited the scope of defendants' conduct and did not authorize a general search. from the language of California **Vehicle Code** Section 2805, the following limitations are apparent:

(a) Action under the section is limited to a member of the California Highway Patrol.

(b) The member of the CHP may inspect. Since the legislature used the word "inspect", it clearly intended something different from a general search and seizure.

(c) Inspection is limited to any vehicle, whole, wrecked, or dismantled. (This statute does not include inspection of trash piles or 50-gallon drums.)

(d) Inspection is limited to "in . . . any automobile dismantler's lot, . . ." (The statute does not authorize seizure, then transportation to another location, then searching or inspecting. Inspection is limited to "in the auto dismantler's lot."

(e) Inspection may include inspection of vehicles wrecked or dismantled. (The language of the statue does not extend to individual parts of an automobile, or to 50-gallon drums.)

Defendants engaged in a warrantless general search of the premises. A search that is a "general search" is constitutionally unacceptable. **Marron v. United States** (1927) 275 U.S. 192, 48 S. CT.. 74, 76, 42 L.Ed. 226; **Stanford v. Texas** (1965) 379 U.S., 476, 85 S. Ct. 506, 510, 13 L.Ed. 431 (which cases refer to searches with a warrant; a warrantless search under

Vehicle Code Section 2805 would certainly have no greater scope.)

Although case law does authorize warrantless inspections of intensely regulated businesses (**United States v. Biswell** [1972] 406 U.S 311, 92 S. Ct. 1593, 32 L.Ed.2d 87), case law does not permit unlimited expansion of an inspection into a warrantless general search.

As the Supreme Court observed in **Marshall v. Barlow's Inc.** 1978) 436 U.S. 307, 323, 98 S. Ct 1816, 1826, 56 L.Ed.2d 304, one of the functions of a search warrant is to set down the scope and objects of the search, beyond the limits of which the inspector is not expected to proceed. In closely regulated industries, this aspect of the protection by search warrant is fulfilled by the express language of the statute which limits the scope and objects of the inspection. This concept is duly

noted in **United States v. Biswell, supra,** 406 U.S., at 315, 92 S. Ct., at 1596, where the court stated:

> "In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not upon consent but the authority of a valid statute."

In the present case, plaintiffs are not contending that **Vehicle Code** Section 2805 is invalid, but rather that defendants arrogated unto themselves the power to expand the scope of a statutorily limited inspection. As the Court noted in **Biswell, supra**, 406 U.S., at 316, 92 S. Ct, 1596, "The dealer is not left to wonder about the purposes of the inspector or the limits of his task." And the Court in **Colonnade Catering Corp. v. United States** (1970 397 U.S. 72, 77, 90 S. Ct. 774, at 776, made it clear that the rules governing the procedure that inspectors

must follow must be incorporated in the legislative inactment or else the **Fourth Amendment** and its various restrictive rules apply. Inferentially, the inspectors must comply with the rules, or the **Fourth Amendment** will also apply to those acts in excess of the statutory power of inspection.

The essential purpose of the proscriptions of the **Fourth Amendment** is to impose a standard of "reasonableness" upon the exercise of discretion by governmental officials, including law enforcement agents, in order "to safeguard the privacy and security of individuals against arbitrary invasions." **State of Delaware v. Prouse** (1979) 440 U.S. 648, 653-654, 99 S. Ct. 1391, 1396, 59 L.Ed.2d 660.

"When an official search is properly authorized -- whether by consent or by the issuance of a valid warrant -- the scope

of the search is limited by the terms of its authorization." **Walter v. United States** (1980) 447 U.S. 649, 656, 100 S. Ct. 1395, at 1201, 65 L.Ed.2d 410. Since the statutory enactment supplies the authorization in **Vehicle Code** Section 2805 inspections, it also sets the limits within which the law enforcement officers, herein defendants McMASTERS and MEDER and KALPAKOFF, must comply. Any search beyond those limits violates the Constitutionally guaranteed civil rights of individual citizens such as LEWIS and IVORY and is actionable.

There was nothing incriminating about the license plates with the numbers cut out nor the Z28 emblem on top of the 50-gallon drum to provide probable cause for transporting the 50-gallon drum to the Fresno County Industrial Farm and inspecting the contents the next day.

In **Michigan v. Tyler** (1978) 436 U.S. 499, 506, 98 S. Ct. 1942, 1948, 56 L.Ed.2d 486, The Supreme Court noted that "a conviction cannot be used ex post facto to validate the introduction of evidence used to secure that same conviction." If that be true, then it is also true that a conviction cannot be used ex post facto to validate unreasonable search and seizure by defendant law enforcement officers.

It was further error for the Courts below to hold that even if the search and seizure of the 50-gallon drum were improper, defendants were entitled to a qualified immunity under **Harlow v. Fitzgerald** (1984) 452 U.S 800, 102 S. Ct. 2727, 73 L.Ed.2d 396. In **Harlow, supra**, 102 S. Ct., at 2738, the Supreme Court stated:

> "We therefore hold that government officials performing discretionary functions generally are shielded

from liability from civil damage insofar as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known." (emphasis added)

The **Harlow** Court went on to state:

(1023 S. Ct., at 2739)

"On summary judgment, the judge appropriately may determine not only the currently applicable law, but whether that law was clearly established at the time an action occurred . . ." "If the law was (sic) clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct . ."(emphasis added)

"By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate and a person who suffers injury caused by

such conduct may have a cause of action" (emphasis added)

The fact that no prior judicial decision had defined the limits of the language of California **Vehicle Code** Section 2805 is irrelevant. Otherwise, the first offender violating any statute would always be immune from lawsuit or prosecution.

Likewise, the mere fact that the present Memorandum Decision of the Ninth Circuit cannot be cited by lawyers except as provided by 9th Cir. R. 21, is meaningless. What is to prevent public officials, including law enforcement officers, from publishing and distributing that decision to provide a permanent excuse for public employees, including law enforcement officers, from the first violation of civil rights as guaranteed under state statutes?

c. Issues Raised.

The issues presented herein were raised before the trial court, except that the question that two district judges had found the inspection was not unconstitutinal did not arise until the appeal when that point was raised by the Ninth Circuit.

The issue of the clarity of **Vehicle Code** Section 2805 was raised at ER 163-164.

The limits upon the scope of a search under a regulated business statute was raised at ER 164: 22 -166: 11.

The issue that defendants were not acting in good faith was raised at ER 167: 17 - 168: 12.

The issue over the license plates with the numbers cut out and the declarations of McMASTERS and MEDER, and the recent origin of the claim that they belonged to

stolen vehicles was raised at ER 168: 23 - 169: 5.

The qualified immunity defense and **Harlow, supra,** were raised at ER 172: 7 - 182: 22.

The **FOURTH AMENDMENT** issue was raised at ER 165: 11-18.)

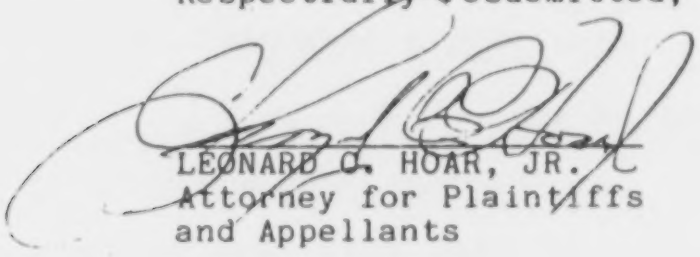
8. **Plenary Consideration.** Appellants believe that this case may not require full plenary consideration by this Court. The error appears on the face of the Memorandum Decision of the Ninth Circuit Court of Appeals, first full paragraph on page 3 and footnote 3 combined (infra, Appendix, pp. 44-45.). Appellants believe that this Court may dispose of the question by way of summary reversal.

WHEREFORE, plaintiffs and appellants LOUISE E. LEWIS and VELMA "SLIM" IVORY pray that this court reverse the judgment

below and that this court also grant attorney fees under the Civil Rights Attorney's Fees Award Act of 1976, and costs incurred herein.

Dated: May 29, 1986

Respectfully resubmitted,



LEONARD O. HOAR, JR.
Attorney for Plaintiffs
and Appellants

APPENDIX

FILED
OCT 22 1985
CLERK,
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CA No. 84-2200

DC No. 79-197 REC

DC Eastern California

LOUISE E. LEWIS and VELMA "SLIM" IVORY,

Plaintiffs and Appellants,

vs.

CHARLES L. McMASTERS, JIM MEDER, and PAUL KALPAKOFF,

Defendants and Appellees.

MEMORANDUM*

Appeal from the United States
District Court for the
Eastern District of California
Hon. Robert E. Coyle
U.S. District Judge
Presiding

Argued and Submitted July 9, 1985-San

Francisco, California.

Before: FERGUSON, NORRIS, and WIGGINS, Circuit Judges.

In a prior appeal in this case, the district court dismissed plaintiffs' complaint for failure to state a claim upon which relief could be granted. That decision was reversed in **Lewis v. McMasters**, 663 F.2d 954 (9th Cir. 1982) [hereinafter **Lewis v. McMasters** I]which remanded the case to the district court for further proceedings.[1]

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

1 In **Lewis v. McMasters** I, our court held, "Section 2805 does not give law enforcement officers authority to conduct general searches of the business premises. "California courts have upheld [the statute's] validity on the ground that, properly construed, the section applies to searches made 'under reasonable circumstances within constitutional limitations.' . . . We conclude it was error to dismiss the complaint on the ground that Section 2805 constitutionally auth-

On remand, the district court granted defendants' summary judgment motion on three grounds. First, the district court held that the California Highway Patrol officers enjoyed absolute immunity from damage actions in federal court under the Eleventh Amendment to the Constitution. Second, the District court held that the the seizure and subsequent search of the 55 gallon drum did not violate appellants' Fourth Amendment rights. Finally, the district court held that even if appellants' Fourth Amendment rights were violated, the officers' conduct was protected by the qualified immmunity doctrine announced by the Supreme Court in **Harlow v. Fitzgerald** 457 U.S. 800 (1982)

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orized the warrantless search of the steel drum." 663 F.2d at 955 (quoting **People v. Lopez**, 116 Cal. App.3d 600, 606-607, 172 Cal. Rptr 236, 239 (Cal. Ct. App. 1981).

We affirm on the basis of qualified immunity alone.[2]

The Supreme Court outlined the contours of the qualified immunity doctrine in **Harlow**:

> Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

457 U.S. at 818.

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2 It is thus unnecessary for us to decide whether the defendant's conduct actually violated the Fourth Amendment. Although we need not reach the Eleventh Amendment issues, we believe that some comment on the handling of this issue is appropriate. On behalf of defendants Meder and McMasters, The Attorney General of California contended below and continued to argue on this appeal that the Supreme Court's recent decision in **Pennhurst State School and Hospital v. Halderman**, 104 S. Ct. 900 (1984), operates as a jurisdictional bar against all Section 1983 actions against state officials in federal court. This contention is utterly without merit. **See Demery v. Kupperman**, 735 F.2d 1139, 1149 (9th Cir. 1984). We also direct the Attorney General's attention to Professor Shapiro's excellent article on the **Pennhurst**

Thus, the question in the case before us is whether a reasonable person would have known that the California statute, Cal. Veh. Code Section 2805, did not authorize the search made by the officers. We conclude that the answer to this question is plainly no.[3] The appellants concede that no judicial decision had defined the limits of Section 2805 at the time of the search. The proposition that under the circumstances, a reasonable person could have concluded that the search was not in violation of the Fourth Amendment

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decision. Shapiro, **Wrong Turns: The Eleventh Amendment and the Pennhurst Case**, 98 Harv. L. Rev. 61 (1984). In addition, the district court was of the opinion that the Supreme Court's decision in **Edelman v. Jordan**, 415 U.S. 651 (1974), bars all damage actions against state employees in federal court. We call the district court's attention to our decision to the contrary in **Demery**, 735 F.2d at 1146-49.

3. Of course, after our earlier decision in this case, California Highway Patrol officers will no longer be able to

is also supported by the fact that the district court in this case has now twice held that the search was not unconstitutional.

Thus, we conclude that all three defendants are protected by the **Harlow** qualified immunity doctrine. The judgment dismissing the complaint is **AFFIRMED.**

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claim successfully that they possess qualified immunity from damage liabilitybecause of unconstitutional searches con-ducted under the general authority of Section 2805.

FILED
Dec 23 1985
CATHY A. CATTERSON
CLERK
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CA. No. 84-2200

LOUISE E. LEWIS and VELMA "SLIM" IVORY,

Plaintiffs and Appellants,

vs.

CHARLES L. McMASTERS, JIM MEDER, and PAUL KALPAKOFF,

Defendants and Appellees.

Before: FERGUSON, NORRIS, and WIGGINS, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for a hearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED,** and the suggestion for a rehearing en banc is **REJECTED.**

FILED
May 30, 1984
Clerk, U.S. District Court
Eastern District of
California

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LOUISE E. LEWIS and VELMA "SLIM" JVORY, Plaintiffs, vs. CHARLES L. McMASTERS, et al, Defendants.	No. Cv-F-79-197 REC ORDER

On May 7, 1984, this matter came on for hearing on defendants' motion for summary judgment. Leonard Hoar appeared on behalf of plaintiffs. Darryl Doke, Deputy Attorney General of the State of California, appeared on behalf of defendants McMasters and Meder and James

Weakley, Eldridge, Anderson, Weakley & Myers, appeared on behalf of defendant Kalpakoff. Following the argument of counsel in support of and in opposition to the motions, the matter was taken under submission.

Plaintiffs' complaint alleges a cause of action pursuant to 42 U.S.C. Section 1983 for damages arising from an allegedly illegal search of AAA Auto Sales and Dismantling and warrantless search and seizure of a 55-gallon drum. The earlier dismissal of plaintiffs' action by Judge Crocker on the ground that Section 2805 of the California Vehicle Code constitutionally authorized the warrantless search and the search and seizure of the steel drum was reversed by the Court of Appeals for the Ninth Circuit in **Lewis v. McMasters**, 663 F.2d 954 (9th Cir. 1982). In its decision, the Court declared:

> Section 2805 does not give law enforcement officers authority to conduct general searches of business premises. California courts have upheld [the statute's] validity on the ground that, properly construed, the section applies to searches made, 'under reasonable circumstances, within constitutional limitations." **Id.** at 955, **quoting People v. Lopez**, 116 Cal. App.3d 600, 606-607 (1981) (citations omitted).

The Court further stated:

> We conclude it was error to dismiss the complaint on the ground that section 2805 constitutionally authorized the warrantless search of the steel drum. Accordingly, we remand the case for further proceedings consistent with this opinion. 663 F.2d at 955.

In considering the Ninth Circuit's decision in **Lewis v. McMasters**, **supra**, and its implications and effect on the action presently before the Court, it is important to recognize that the Ninth Circuit was reversing an order granting a motion to dismiss. In ruling on a motion to dis-

miss under Fed. R. Civ. P,. 12(b)(6), the court's inquiry is limited to an examination of the allegations on the face of the complaint[1] and the allegations must be assumed to be true and construed in the light most favorable to the charging party.

California Dump Truck Owners Association v. Associated General Contractors of

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[1]The pertinent allegations regarding defendants' conduct are set forth in paragraph 6 which reads:

> On July 27, 1976, plaintiff Louise E. Lewis as lawfully operating her business known as AAA Auto Sales and Dismantling and plaintiff Velma "Slim" Ivory was lawfully employed as her yard manager. At that time and place, defendants were then as a part of their regular and official employment as law enforcement officers, engaged in the conduct of a warrantless search and seizure at AAA Auto Sales and Dismantling on the basis of a telephone tip under the guise of an inspection pursuant to the provisions of California Vehicle Code Section 2805. As part of said warrantless search and seizure, defendants searched trash piles and seized a 50-gallon drum filled with old metal parts and used

America, 562 F.2d 607, 614 (9th Cir. 1977); McKinney v. DeBard, 507 F.2d 501, 503 (9th Cir. 1974).

On a motion for summary judgment, however, the Court may consider matters outside the pleadings and when a motion is supported by affidavit the opposing party "may not rest upon the mere allegations . . . of his pleadings," but must by affidavit or otherwise "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56e. Thus, the Ninth Circuit's decision in Lewis v. McMasters, supra, does not necessarily foreclose the award of summary judgment in defendants' favor.

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as a space heater, took it to the County Industrial Farm, emptied it, and then found three partially burned documents -- a pink slip, vehicle registration card and a California State University Fresno courtesy parking permit, together with a VIN plate, all of which belonged to a stolen automobile.

Defendants argue, inter alia, they are entitled to summary judgment because theinspection and seizure of the 55-gallon drum did not exceed the bounds of Section 2805, was supported by probable cause, and therefore plaintiffs' Fourth Amendment rights were not violated.[2] The

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[2]Citing the recent Supreme Court decision in **Pennhurst State School and Hospital v. Halderman**, ____ U.S. ____, 52 U.S.L.W. 4155 (Jan.23, 1984), defendants argue the Eleventh Amendment bar plaintiffs' action, affords them immunity from suit, and prohibits this Court from exercising jurisdiction over plaintiffs' claim. Defendants' reliance on the **Pennhurst** decision is misplaced. The issue in that case concerned whether state official had violated state law in the execution of their official duties. Here, plaintiffs have alleged a violation of their rights under the federal constitution.

Nevertheless, defendants' argument that the Eleventh Amendment grants states (and state officers acting in their official capacities) immunity from retroactive monetary relief is supported by the

constitutionality of Section 2805 is not at issue. Nor is it disputed by plaintiffs that defendants were authorized to enter the premises pursuant to Section

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Supreme Court's decision in **Edelman v. Jordan**, 415 U.S. 651 (1974). **Accord Quern v. Jordan**, 440 U.S. 332 (1949); **see also Glosen v. Barnes**, 724 F.2d 1418, 1419-20t(9th Cir. 1984); **Jackson v. Hayakawa**, 682 F.2d 1344, 1350-51 (9th Cir. 1982). Because the defendants here are sued for actions taken "as a part of their regular and official employment as law officers" (Paragraph 6 of Complaint), defendants Meder and McMasters are entitled to immunity under the Eleventh Amendment and this Court lacks jurisdiction to adjudicate plaintiffs' claims against them. Thus, they are entitled to summary judgment. (Plaintiffs argue that defendants waived any immunity under the Eleventh Amendment by their failure to raise this defense earlier. This argument is without merit. As the Supreme Court noted in **Edelman**, the Eleventh Amendment defense is a jurisdictional bar and may be raised at any time. 415 U.S. 651, 677-78).

Defendant Kalpakoff is not an employee of the state and therefore is not entitled to claim immunity under the Eleventh Amendment. Thus, the Court is required to consider the other arguments raised by defendants in support of their motions for summary judgment.

2805 and that they were lawfully on the premises at the time they discovered a stolen Buick and other evidence of stolen automobiles on the lot. Plaintiffs assert, however, that defendants' search and seizure of a 55-gallon barrel in the yard was not authorized by Section 2805 and was not otherwise justified.

Assuming that Section 2805 did not authorize the officers to search and seizethe 55-gallon drum at AAA Dismantling and Auto Sales does not necessitate a finding that the officers' conduct was unlawful and that plaintiffs' constitutional rights were violated. It is established that when officers are legitimately in a location and they observe an unconcealed object of incriminating character, the article is subject to seizure without a warrant. Coolidge v. New Hampshire, 403 U.S. 443 (1971). So long as the of-

ficers have come upon the incriminating article during a search, otherwise within its permissible scope, the Supreme Court has held that it would be a needless inconvenience to require the police to obtain a warrant before seizing it. 403 U.S.at 467-68.

Here, it is undisputed that the officers were lawfully on the premises and were in the process of inspecting vehicles and their dismantled parts. It is established, without controversy that at least one stolen vehicle had been found on the premises prior to the conduct complained of by plaintiffs. It is further established by the uncontroverted affidavit of Officer Meder that he observed a license plate in plain view in the trash barrel, that upon closer observation he discovered other license plates in the trash barrel, and that running a check

with the Department of Motor Vehicles some of the license plates were reported stolen.[3]

From the undisputed facts presented, the Court is satisfied that Officer Meder's conduct was lawful. According to his uncontroverted affidavit, the barrel was open, its contents unconcealed and the license plates were observed in open

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[3]While a license plate might be an innocuous object in most circumstances, here Officer Meder had a reasonable basis for believing the license plate might be incriminating in nature. According to his declaration, upon arriving at AAA Dismantling, Mr. Ivory explained the procedure used by the business for retaining license plates to document any vehicles or parts of vehicles that were in the yard. The presence of the license plates in the trash barrel was not consistent with the procedure explained to Officer Meder.

The fact that Officer McMasters testified at trial that there were license plates scattered around the yard and that he did not testify that he checked every license plate in the yard does not in any way undercut the reasonableness of Officer Meder's seizure of license plates from the barrel and a check of them with the Department of Motor Vehicles.

sight. Under the "plain view" doctrine, objects falling within the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence. No warrant is required to search and seize it. There is nothing before the Court which would suggest that Officer Meder was not lawfully on the premises or in a position to view incriminating articles in open view.[4] Furthermore, having discovered stolen license plates in the barrel, the oficers were justified in conducting a search of the 55-gallon barrel for additional evidence and seizing the barrel.[5] Thus,

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[4]Similarly, the uncontroverted affidavits of the officers show that the objects discovered in the trash piles in the yard were in "plain view" and their discovery inadvertent. Thus, their seizure was proper and constituted no violation of plaintiffs' constitutional rights.

[5]Plaintiffs complain that the

Thus, the Court finds that the officers' conduct did not violate plaintiffs' constitutional rights and summary judgment is therefore appropriate.[6]

Accordingly, for the foregoing reasons,

IT IS HEREBY ORDERED that defendants' motions for summary judgment are GRANTED.

DATED: May 30, 1984.

ROBERT E. COYLE
United States District
Judge

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officers' seizure of the barrel and subsequent search of its contents violated their Fourth Amendment rights. This argument is without merit. As discussed above, the uncontroverted testimony presented to the Court demonstrates that evidence of a crime had been found in the barrel and that the officers had initiated their search of the barrel's contents in the yard. The officers decided to seize the barrel and search it at another location in order to conduct a more thorough and systematic search. The decision to continue the search at a different loca-

tion at a later time did not necessitate the acquisition of a warrant. The Ninth Circuit has upheld the warrantless search of containers where a cursory search is made initially at the scene of the arrest, followed by a more thorough search at a different location. **United States v. Burnette**, 698 F.2d 1038, 1049 9th Cir.), **cert. denied** ____U.S.____, 103 S. Ct. 2106 (1983).

[6]Even if the search and seizure of the 55-gallon drum was improper, the Court finds that defendants would be entitled to qualified immunity under the Supreme Court's decision in **Harlow v. Fitzgerald**, 457 U.S. 800 (1982). (The affirmative defense of qualified immunity was extended to law enforcement officers in **Pierson v. Ray**, 386 U.S. 547 (1967).) As set forth in defendants' memoranda, at the time of the search and seizure, no case had circumscribed the scope of a search under Calif. Vehicle Code Section 2805. Furthermore, the officers had sufficient probable cause to warrant their belief that an expanded search and seizure was authorized and that no constitutional violation was involved. The reasonableness of this view is demonstrated by the fact that no suppression motion was filed by plaintiffs at their trial, as well as by the opinions of magistrate Christensen and Judge Crocker which upheld the lawfulness of the officers' conduct.

FILED
Jan 22 1986
Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

CA# 84-20200

DC# 79-197 REC

DC: EASTERN CALIFORNIA

LOUISE E. LEWIS, et al,

Plaintiffs and Appellants,

vs.

CHARLES L. McMASTERS, JIM MEDER, and PAUL KALPAKOFF,

Defendants and Appellees.

NOTICE OF INTENT TO APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that plaintiffs and appellants LOUISE E. LEWIS and VELMA 'IVORY' intend to appeal to the Supreme

Court of the United States from the Order of December 23, 1985, denying the Petition for Rehearing and Denying the Petition for Rehearing En Banc.

Dated: January 19, 1986

_____

LEONARD C. HOAR, JR.
Attorney for Plainiffs
and Appellants

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss
COUNTY OF FRESNO)

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 3948 E. Gettysberg, Fresno, California 93726. On June 3, 1986, I served the **resubmission** of the within Jurisdictional Statement on the attorneys for the defendants, the Ninth Circuit Court of Appeal, and the United States District Court, Eastern District of California, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Fresno, California addressed as follows:

JOHN K. VAN DE KAMP, Attorney General
of the State of California
SEWARD L. ANDREWS,
Deputy Attorney General
G. MICHAEL GATES,
Deputy Attorney General

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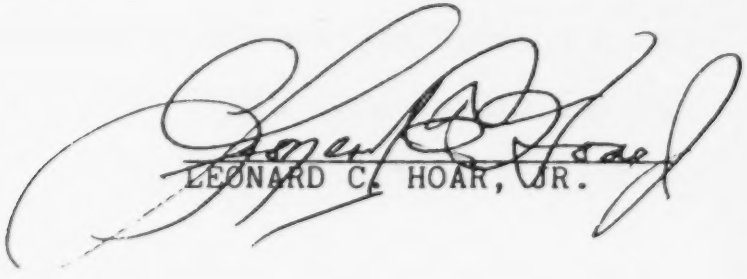
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The Honorable Robert E. Coyle
United States District Judge
Federal Courthouse
1130 "O" Street
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Clerk
United States Court of Appeal
For the Ninth Circuit
P.O. Box 547
San Francisco, CA 94101

I declare, under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 2, 1986, at Fresno, California.



LEONARD C. HOAR, JR.

Supreme Court, U.S.
FILED
JUL 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2005

In The
Supreme Court of the United States
October Term, 1985

LOUISE E. LEWIS and VELMA "SLIM" IVORY,
Appellants,

vs.

CHARLES L. McMASTERS, JIM MEDER, and PAUL KALPAKOFF,
Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE AFFIRM THE ORDER

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No. 85-2005

—o—

In The

Supreme Court of the United States

October Term, 1985

—o—

LOUISE E. LEWIS and VELMA "SLIM" IVORY,

Appellants,

vs.

CHARLES L. McMASTERS, JIM MEDER, and PAUL KALPAKOFF,

Appellees.

—o—

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE AFFIRM THE ORDER

—o—

Appellee moves the court, pursuant to Rule 16(1)(d) of the rules of this Court, to dismiss the appeal or, alternatively, to affirm the judgment of the United States Court of Appeals for the Ninth Circuit. This request is made on the grounds that appellee, PAUL KALPAKOFF,

acted in such good faith and with probable cause as to not have violated the Fourth Amendment rights of appellants, LOUISE E. LEWIS and VELMA IVORY, and that appellants have requested an incorrect remedy.

———o———

STATEMENT

This is an appeal from a decree of the United States Court of Appeals for the Ninth Circuit, who denied a rehearing to appellants on the motion for summary judgment granted to appellee. The facts underlying the appeal are as follows:

Appellee, PAUL KALPAKOFF, has been a Deputy Sheriff for seventeen (17) years. He has worked for the auto theft division since 1974 and has had training on Vehicle Code Section 2805.

On or about July 26, 1976, PAUL KALPAKOFF received information that there were stolen vehicles at AAA Auto Sales and Dismantling. PAUL KALPAKOFF contacted the California Highway Patrol Automotive Theft Detail, informed them of the possible stolen vehicles, and requested their assistance.

On or about July 27, 1976, PAUL KALPAKOFF and California Highway Patrol Officers Charles L. McMasters, Jim Meder, and Sergeant Dwight Bell went to AAA Auto Sales and Dismantling in order to conduct an investigation and inspection of the wrecking yard. Appellant, LOUISE LEWIS, was informed of the intent of the California Highway Patrol Officers to inspect her wrecking yard

pursuant to Vehicle Code Section 2805. LOUISE LEWIS telephoned her attorney who informed her the California Highway Patrol Officers had the right to inspect her premises. Appellant, LOUISE LEWIS, then allowed the officers to proceed with their inspection.

California Highway Patrol Officer Jim Meder first spoke with the yard manager, VELMA IVORY. He explained to Officer Meder the procedure of taping together car license plates and identifying the plates with the vehicle identification number, the year, make, and model number of the car to be dismantled. The plates would then be sent to the Department of Motor Vehicles so that they could clear their records of the vehicle.

Upon further inspection of the yard, PAUL KALPAKOFF and the California Highway Patrol Officers found parts of vehicles they believed to be stolen. Initially found were parts of a 1972 green Buick which PAUL KALPAKOFF believed to be from a vehicle recently stolen from Deputy Sheriff Green. Deputy Sheriff Green was notified and requested to appear at the dismantling yard to identify the 1972 green Buick parts. Deputy Sheriff Green arrived and identified parts of his stolen 1972 green Buick by stickers and other distinctive markings.

Another item found in the yard was a Ford Pinto engine. The block number was taken from the engine and checked. The engine belonged to a Ford Pinto stolen in Illinois. Also a vehicle identification plate was found in the dismantling yard. It was identified as belonging to a stolen 1969 Camaro Z28.

In the latter part of the inspection, Officer McMasters approached the door of a Mercury Cougar. Near the car door was a 55 gallon barrel in which Officer McMasters noticed a license plate. It struck him as odd the plate was in this barrel as he recalled MR. IVORY stating that the plates of vehicles being dismantled were sent to the Department of Motor Vehicles. Officer McMasters searched further in the barrel and found more license plates. Officer McMasters checked the license plates with the Department of Motor Vehicles and found most were from vehicles reported stolen.

The decision was then made to seize the 55 gallon barrel. The barrel was taken to the Fresno County Industrial Farm where it could be easily searched, and where there was no chance the contents of the barrel would be lost or destroyed.

Appellee, PAUL KALPAKOFF, and the California Highway Patrol Officers believed there was probable cause to arrest the appellants, LOUISE LEWIS and VELMA IVORY, before the barrel was searched.

Appellants, LOUISE LEWIS and VELMA IVORY, were convicted of receiving stolen articles. This conviction was later overturned, as the testimony of an expert convinced the court the evidence found at AAA Auto Dismantling and Sales had been planted by an unknown person.

On or about July 24, 1979, LOUISE LEWIS and VELMA IVORY filed a Title 42 USC Section 1983 action against PAUL KALPAKOFF and California Highway Patrol Officers McMasters and Meder.

On or about September of 1979, defendant/appellee filed a motion to strike and a motion to dismiss the Title 42 USC Section 1983 action filed against him. The motion was heard by the Honorable A. D. Christensen, a United States Magistrate. The United States Magistrate recommended dismissal of the Title 42 USC Section 1983 action filed against appellee.

On or about January 29, 1980, Judge Crocker of the United States District Court concurred with the United States Magistrate and granted the recommended dismissal.

On or about February 5, 1980, LOUISE LEWIS and VELMA IVORY appealed the dismissal to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the dismissal and remanded the case to the District Court.

On or about November 7, 1983, PAUL KALPAKOFF filed a motion for summary judgment in the United States District Court of the Eastern District. On May 30, 1984, the motion for summary judgment was granted by Judge Robert Coyle.

On or about October 22, 1985, appellants filed an appeal to the granted motion for summary judgment. The motion for summary judgment was affirmed.

On December 23, 1985, appellants filed a motion for rehearing. The United States Court of Appeals for the Ninth Circuit denied appellant's motion for rehearing.

On January 22, 1986, appellants filed a notice of intent to appeal to the Supreme Court of the United States.

———o———

ARGUMENT

Appellants complain, in this case, that a 55 gallon barrel was illegally seized under the guise of Vehicle Code Section 2805, in violation of appellants' Fourth Amendment rights under Title 42 USC Section 1983. In all the courts below the validity or constitutionality of Vehicle Code Section 2805 was not an issue.

The sole basis for review by this Court under the facts presented is that specified in Title 28 USC Section 1254(1), namely a writ of certiorari. Appellant has cited Title 28 USC Section 1254(b) which does not exist. If appellants meant (2), they are still incorrect as none of the courts below have held the state statute, Vehicle Code Section 2805, to be invalid, or in any way repugnant to the United States Constitution.

In the alternative, appellee requests that the Ninth Circuit Court of Appeals' Decision be affirmed as this case presents no substantial question warranting plenary consideration by this Court.

Under *Harlow and Butterfield vs. Fitzgerald*, 457 US 800 (1982), there exists for certain officials a qualified or good faith immunity. Under this qualified immunity, the court held that:

> . . . government officials performing discretionary functions generally are shielded from liability for civil

> damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
>
> *Id,* p. 818.

To state this in another way, the qualified immunity will not apply in a situation where the official should have known that his action would violate a person's constitutional rights and/or if he acts with any form of malicious intent.

Harlow, supra, extended the qualified immunity and good faith defense to high ranking officials in the executive department. However, the immunity also applies to police officers under *Pierson vs. Ray,* 386 US 547 (1967), which holds at page 557:

> . . . that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under Section 1983.

In the case at bar PAUL KALPAKOFF is being sued in a civil action under Title 42 USC Section 1983. The suit resulted from the seizure of a barrel found during a lawful inspection done of AAA Auto Dismantling and Sales pursuant to Vehicle Code Section 2805.

Before the barrel was seized, appellee and the two California Highway Patrol Officers had proof there were stolen vehicles on the premises. The evidence found in the 55 gallon barrel was of a destructible nature. In order to prevent any loss or destruction of the evidence, it was decided the barrel should be moved to another location.

This combination of circumstances gave the officers the reasonable belief they had probable cause to seize the

barrel. The barrel was not taken with any wrongful intent on the part of any of the officers. They felt they were doing their duty, as the circumstances necessitated under Vehicle Code Section 2805.

At the time the barrel was seized, the officers believed they had probable cause under Vehicle Code Section 2805 to seize the barrel without first obtaining a warrant. Under *United States vs. Biswell,* 406 US 311 (1972) there is authority allowing officers, investigating under a statute, to seize evidence of a crime found on the business premises during lawful inspection.

The facts in *Biswell, supra,* parallel this case in that federal agents found and seized several sawed-off rifles during an inspection authorized by statute. The owner sued the federal agents alleging that the seizure violated his Fourth Amendment rights. The case went before the Supreme Court and they held that the seizure of the unlicensed sawed-off rifles did not violate the Fourth Amendment.

Biswell, supra, also points out that heavily regulated businesses are subject to inspection. Each owner of such a business should know they are subject to such inspections. *Biswell, supra,* holds at page 317 that,

> . . . the inspection may proceed without a warrant where specifically authorized by statute. The seizure of respondent's sawed-off rifles was not unreasonable under the Fourth Amendment, and the judgment of the Court of Appeals is reversed, . . .

In the case at bar, appellee and the two accompanying Highway Patrol Officers were inspecting AAA Auto Dismantling and Sales under a valid Vehicle Code Section

2805. During the later part of the inspection, California Highway Patrol Officer McMasters was drawn to a 55 gallon barrel by the sight of a license plate on top of the trash. Officer McMasters recalled he had earlier been informed that VELMA IVORY taped all license plates together, recorded information on them and delivered the plates to the Department of Motor Vehicles. A further search of the barrel revealed other license plates which he checked through the Department of Motor Vehicles, finding most belonged to stolen vehicles.

Under the rational of *Biswell, supra,* it was not unreasonable for PAUL KALPAKOFF and the accompanying Highway Patrol Officers to seize the barrel containing evidence of the crime of automobile theft on the ground that the evidence contained in the barrel could easily have been lost or destroyed. The papers and license plates found in the barrel could have been burned or destroyed by other methods available in the auto wrecking yard. In order to preserve the evidence the officers felt the barrel should be removed to an area where it could not be destroyed.

Under *Harlow, supra,* and *Smiddy vs. Varney,* 665 F.2d 261 (9th Cir. 1981), police officers should not be forced to predict the constitutional interpretation by the courts. *Smiddy* states,

> It is necessary that police officers be immune when they reasonably believe that probable cause existed, even though it is subsequently concluded that it did not, because they "cannot be expected to predict what federal judges frequently have considerable difficulty in deciding and about which they frequently differ among themselves."
>
> *Id,* p. 266.

Harlow, supra, concurs in that the court holds, at page 818,

> If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Under the rationale of these two cases, *Harlow* and *Smiddy, supra,* appellee, PAUL KALPAKOFF, and the two California Highway Patrol Officers proceeded in a manner which they in good faith believed to be lawful. Vehicle Code Section 2805 does not speak of the procedure officers should take when finding evidence of a crime while inspecting pursuant to this section. Also, the issue regarding seizure of evidence of a crime has not previously been raised. The officers could not reasonably be held to know whether the courts would or would not authorize such activity, and we should not expect them to try.

People vs. Woolsey, 90 Cal.3d 934, 1002 (1979) states in pertinent part that the purpose of Section 2805 of the Vehicle Code is ". . . to eliminate trafficking in stolen cars and the illegal interchange of stolen auto parts, . . ." Under Vehicle Code Section 2805 California Highway Patrol Officers were given the authority to enter areas, such as an auto dismantling yard, and inspect and investigate for stolen auto parts. It has been stated in *Biswell, supra,* at page 316,

> If inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to

be preserved, the protections afforded by a warrant would be negligible.

Under the purpose stated in *Woolsey, supra,* and the rationale stated in *Biswell, supra,* it is clear that to have forced appellee, PAUL KALPAKOFF, and the accompanying California Highway Patrol Officers to obtain a warrant would have frustrated the purpose and intent of allowing an inspection of auto dismantling yards under Vehicle Code Section 2805. The officers proceeded with their inspection in a lawful manner. They proceeded with the seizure in a manner they reasonably and in good faith felt was lawful and which did not violate any person's Fourth Amendment rights. To have forced the officers to obtain a warrant might have meant destruction or loss of the contents of the barrel, or other evidence, in the dismantling yard. To require a warrant, would frustrate all purposes and intents of an unannounced inspection, which is to catch those violating the law unaware.

> . . . [t]o recover the plaintiff must clear two hurdles: probable cause must be shown not to have existed; the officers must be shown not to have reasonably believed in good faith that probable cause did exist. *Smiddy, supra,* at page 266.

In the case at bar, the appellants have only pointed out errors of the courts below. They have not shown that appellee, PAUL KALPAKOFF, and the California Highway Patrol Officers lacked a reasonable, good faith belief they were acting in a lawful manner, or that they lacked probable cause to seize the barrel.

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CONCLUSION

For the reasons stated above, appellee moves that this appeal be dismissed and, treating the proceeding as an application for a writ of certiorari, that the writ be denied.

In the alternative, and for the foregoing reasons, appellee respectfully submits that the questions presented by appellants are clearly insubstantial and that the judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX

Title 28 USC Section 1254 (1) and (2)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or land of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented: * * *